TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~384~~ 104

DAVID D. ROSS, AS ADM'R OF JOHN H. BULLS, DEC'D,
PLAINTIFF IN ERROR,

vs.

JONES, BROWN & COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 23, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 384.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eighth circuit and eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition, of a judgment in a plea which is in the said circuit court before you, between Jones, Brown & Co., plaintiffs, and David D. Ross, as adm' of estate of John H. Bulls, deceased, defendant, a manifest error hath happened, to the great damage of the said David D. Ross, as such administrator, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded,

2 if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd day of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error what of right and according to law and the custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 29 day of April, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[SEAL.] Attest: FRANK E. WRIGHT, *Clerk.*

3 Allowed.

HENRY C. CALDWELL,
Dist. Judge.

The execution of this writ of error appears by the schedule hereto annexed.

FRANK E. WRIGHT, *Clerk.*

(Indorsed:) David D. Ross vs. Jones, Brown & Co. Writ of error to Supreme Court. Filed Apr' 29, '72. Frank E. Wright, clerk. C. & W.

4 Be it remembered that on the thirteenth day of October, A. D. 1871, came into the clerk's of the circuit court of the United States for the eastern district of Arkansas, Jones, Brown & Co., by Messrs. English, Yantt, and English, their attorneys, and filed therein their declaration in assumpsit against David D. Ross as administrator of John H. Bulls, deceased, which is in the words and figures following, to wit:

Circuit court U. S., eastern district Ark's, October term, 1870.

Ruben S. Jones and William N. Brown, survivors of Marling B. Jones, deceased, late partners under the firm-name and style of Jones, Brown & Co., who are, as was their deceased partner, citizens of the State of Tennessee, complain of David D. Ross, as administrator with the will annexed of John H. Bulls, deceased, who is a citizen of the State of Arkansas, of a plea of trespass on the case on promises.

For that whereas one Robert E. Rives, on the 31st day of January, 1860, at Memphis, Tennessee, to wit, in said eastern district,

5 made and delivered to said John H. Bulls, then living, since deceased, his certain promissory note in writing of that date, to the

court here shown, whereby he promised to pay, nine months after the date of said note, to the order of said John H. Bulls, fourteen hundred and eighty-eight dollars and eighty-eight cents at the Branch Union Bank of Tennessee, at Memphis, value received.

And the said John H. Bulls, to whose order said promissory note was made payable, afterwards in his lifetime, to wit, on the said 31st day of January, 1860, and before the payment of said sum of money in said note specified, or any part thereof, endorsed for value and delivered said note to the said Jones, Brown & Co., composed of the plaintiffs and the said Marling B. Jones, since deceased, which said endorsement is to the court here shown.

And the said Jones, Brown & Co. afterwards at the maturity of said note, to wit, on the third day of November, 1860, presented said note at the Branch Union Bank of Tennessee, at Memphis, for payment, and payment thereof was refused, and the same then and there protested for non-payment, of all which the said John Bulls in his lifetime
6 then and there had due notice, whereby he became liable to pay said Jones, Brown & Co. the said sum of money in said note specified, with costs of protest, damages, &c., amounting to a large sum of money, to wit, the sum of two thousand dollars.

Afterwards, to wit, on the day of 1869, the said John Bulls having made and published his last will and testament, departed this life, and afterwards, to wit, on the 2d day of December, 1869, his will was duly protested in the probate court of Prairie County, in said district, and Amanda F. Bulls, his widow, named as executrix in and by said will, duly qualified as such, and took upon herself the burthens thereof.

And afterwards, to wit, on the day of 1871, the said Amanda F. Bulls intermarried with the said defendant, David D. Ross, whereby her letters testamentary were revoked, and afterwards, to wit, on the 7th day of September, 1871, the said defendant was duly appointed by said probate court administrator with the will annexed of said John H. Bulls, deceased, and duly qualified as such, and took upon himself the burthens thereof.

Yet the said John H. Bulls in his lifetime did not pay to said
7 Jones, Brown & Co. nor to plaintiffs since the death of said Marling B. Jones the said sum of money in said promissory note specified, nor said protest fees and damages nor any part thereof, nor did the said Amanda F. Bulls whilst she was such executrix pay the same, nor has the said Robert E. Reeves paid the same, nor has the said defendant, though requested, paid the same, or any part thereof, but the same remains wholly unpaid, to the damage of the said plaintiffs of three thousand dollars, wherefore they sue.

ENGLISH, YANTT, AND ENGLISH,
Atty's for Pl'ffs.

$1,488\frac{88}{100}$. MEMPHIS, TENN., *January 31st*, 1860.

Nine months after date I promise to pay to the order of John H. Bulls fourteen hundred and eighty-eight $\frac{88}{100}$ dollars at the Branch Union Bank of Tennessee, at Memphis, value received.

ROBERT E. RIVES,
Walnut Plains, Ark's.

(On margin:) R. S. JONES.

Signed by R. S. Jones in my presence.

J. J. BOUGHM,
Com'r.

(Endorsed:) John H. Bulls, Walnut Plains, Ark's.

8 Protested for non-payment at maturity, and notice to Bulls, as endorser for Jones, Brown & Co., holders.

Estate of John H. Bulls to Jones, Brown & Co., Dr.

To amount of above note	$1,488 88
Interest on same	
Protest fee	2 00
	$

STATE OF TENNESSEE,
County of Shelby:

I, R. S. Jones, a member of the firm of Jones, Brown & Co., do solemnly swear that said firm are the holders of a note of which the foregoing is a copy, and that the said note and interest and protest fee as above is a just demand against the estate of John H. Bulls, as endorser of said note, and that nothing has been paid or delivered in satisfaction thereof, and the sum above demanded, that is, the principal of the note, interest, and protest fee, remains due and wholly unpaid: So help me God.

R. S. JONES.

9 Sworn and subscribed to before me this 16th day of June, 1871.

J. P. BOUGHNER,
Commissioner for the State of Arkansas in Memphis, Tennessee.

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM. OF JOHN H. BULLS, deceased,

We acknowledge ourselves bound to pay all costs for which the plaintiffs may be liable in the above case.

DOWDLE & EMBREY.

Filed October 13, 1871.

FRANK E. WRIGHT,
Clerk.

And on November 10th, A. D. 1871, the clerk of said court issued a writ of summons, which is in the words and figures following, to wit:

10 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the marshal of the eastern district of Arkansas, greeting:

You are hereby commanded to summon David D. Ross, as administrator of John H. Bulls, dec'd, who is a citizen of the State of Arkansas, defendant herein, if he be found within your district, to appear before the judges of our circuit court of the United States in and for the eastern district of Arkansas, at the United States court-room, in the city of Little Rock, on the first day of our next April term, 1872, to answer Ruben S. Jones and William N. Brown, survivors of Marling B. Jones, dec'd, late partners under the name of Jones, Brown & Co., citizens of the State of Tennessee, plaintiffs herein, of a plea of trespass on the case on promises, to the damage of plaintiff three thousand dollars.

And have you then and there this writ, with the manner of execution hereof indorsed hereon.

In testimony whereof Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed this 10 day of November, A. D. 1871, and in the 96 year of our Independence.

[L. S.] Attest: FRANK E. WRIGHT,
Clerk.

11 Which writ is endorsed as follows:

In obedience to the within, I have summoned the within-named David Ross, adm. of John H. Bulls, dec'd, by reading the same to him in his presence and hearing, at Des Arc, in the eastern district of Arkansas, on this 17 day of January, A. D. 1872.

ISAAC C. MILLS,
U. S. Marshal,
By JNO. McCLINTOCK,
Sheriff Prairie Co. & Special Deputy Marshal.

Returned and filed February 13, 1872.

FRANK E. WRIGHT,
Clerk.

12 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 8th day of April, Anno Domini one thousand eight hundred and seventy-two, at the United States court room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on April 9th, A. D. 1872, as follows:

JONES, BROWN & CO.,
vs.
DAVID D. ROSS, ADM. BULLS, SR.

Comes the defendant, by Clark and Williams, his attorneys, and files herein his two pleas of non-assumpsit and statute of limitation, and come the plaintiffs, by E. H. and P. D. English, their attorneys, and file herein their replication to defendant's plea of statute of limitation.

Which pleas of non-assumpsit and statute of limitation are in the words and figures following, to wit:

13 United States circuit court for eastern district of Arkansas.

BROWN, JONES & CO.
vs.
DAVID D. ROSS, AS ADM. ESTATE OF JOHN H. Bulls, dec'd.

1. And the said defendant comes and defends the wrong, when, &c., and for plea to the said declaration says actionem non, because he says that he did not undertake and promise in manner and form as the said plaintiffs have, in their said declation, thereof above complained against him, and of this he puts himself upon the country. Wherefore, &c.

2. And for a second and further plea in this behalf he, the said de-

fendant, says actionem non, because he says that the said cause of action in the said plaintiff's declaration contained did not accrue to them against the said defendant at any time within five years
14 next before the granting of letters on the estate of the defendants' intestate, John H. Bulls, and this he is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him, the said defendant.

CLARK & WILLIAMS,
For Def't.

Filed April 9, 1872.

FRANK E. WRIGHT,
Clerk.

And which replication is in the words and figures following, to wit:

In the circuit court of the United States, eastern district of Arkansas.—April term, 1872.

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM. JOHN H. BULLS.

Come the plaintiffs, by attorney, and as to the second plea of the defendant say precludi non, because they say that for a long space of time, to wit, from the 1st of June, 1861. to the 2d April, 1866,
15 a war existed between the United States and the Confederate States, including the State of Arkansas, where during all that period the said John H. Bulls resided, and that during all that period the courts of the United States in and for said State of Arkansas were, by reason of the said war, closed, and no process could be issued therefrom or served on the said John H. Bulls, the authority of the United States therin being resisted, &c. That said John H. Bulls died in said State of Arkansas on the [illegible] November, 1869, and letters testamentary were duly granted to Amanda Bulls afterwards, to wit, on the 2d December, 1869, by the probate court of Prairie County, Arkansas, and that, counting out the period of said war, the said plaintiffs cause of action did accrue within five years next before the said grant of letters on the estate of said John H. Bulls; and this they are ready to verify. Wherefore they pray judgment.

ENGLISH,
For Pl'ffs.

Filed April 9, 1872.

FRANK E. WRIGHT,
Clerk.

16 And on April 10th, A. D. 1872, as follows:

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM. BULLS, &C.

Comes the defendant, by Clark and Williams, his attorneys, and files herein his third plea.

Which plea is in the words and figures following, to wit:

JONES, BROWN & CO.
vs.
DAVID ROSS, AS ADM'R ESTATE OF JOHN BULLS, dec'd.

And the said defendant, for a further and third plea in this behalf,

says actio non, because he says that after the said note sued on had become due and payable, and had been protested for non-payment, as alleged in said plaintiff's declaration, to wit, about the 1st day of January, 1861, the said John Bulls, who, together with the said Reaves, were citizens and residents of the State of Arkansas, caused a
17 notice in writing to be served on the said Jones, Brown & Co., the holders of said note, and now plaintiffs herein, informing them that he, the said Bulls, was endorser on the said note only, and as such only security; that said Reeves was the principal, and had ample property and effects out of which to make the debt, and notifying them to sue upon the said note immediately, or in default thereof he, the said Bulls, should claim to be free from all liability thereon.

And the said defendant avers that said plaintiffs did not comply with said notice, and did not sue on said note for more than the space of twenty days thereafter, and not until he brought this suit. Wherefore he prays judgment of the said plaintiffs ought to have or maintain their aforesaid action against him.

CLARK & WILLIAMS.

Filed April 10, 1872.

FRANK E. WRIGHT,
Clerk.

And on April 12th, A. D. 1872, as follows:

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM. BULLS, &C.

18 Come the plaintiffs, by E. H. and P. D. English, their attorneys, and file herein their demurrer to defendant's third plea.

Which demurrer is in the words and figures following, to wit:

United States circuit court, eastern district of Ark's, April term, 1872.

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM. OF JOHN H. BULLS.

The plaintiffs demur to the third plea of defendant on the grounds following:

1. The endorsement of Bulls made him primarily liable to the plaintiffs on his contract of endorsement. His contract was separate and distinct from that of Rives, the maker of the note. There was no unity or privity of contract between Rives and Bulls; and Bulls was in no sense the surety of Rives on his contract.

19 2. The liability of Bulls on his contract as endorser became perfect on protest of the note and notice, and he could not discharge it by the matter set up in the plea under the Arkansas statute.

3. The plea is otherwise bad. Wherefore plaintiffs pray judgment.

ENGLISH.

Filed April 12, 1872.

FRANK E. WRIGHT,
Clerk.

And on April 13th, A. D. 1872, as follows:

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM. BULLS, &C.

Comes the defendant, by Clark and Williams, his attorneys, and as

to the demurrer of plaintiffs to his third plea to the declaration he submits thereto, and asks leave to file an amended third plea and a fourth plea to the declaration, which leave is granted, and such pleas are filed accordingly, and thereupon the defendant also filed his rejoinder to plaintiffs' replication to his plea of statute of limitation; and
20 thereupon the plaintiffs, by E. H. and P. D. English, filed their several demurrers to defendant's said amended third plea and to defendant's fourth plea, and also files his demurrer to defendants' rejoinder to plaintiff's replication to defendant's plea of statute of limitations.

Which amended third plea and fourth plea are in the words and figures following, to wit:

JONES, BROWN & Co.
vs.
DAVID D. ROSS.

And now comes the defendant and prays leave to file an amended third plea to said plaintiffs' declaration, which is granted, and thereupon said defendant by such leave as to the said declaration says actionem non, because he says that his endorsement of said note sued on was made at Walnut Plains, in Arkansas, and that the consideration for the said note sued on was a debt due from the said Reaves, the maker, to the plaintiffs for the sum mentioned in the same, and the said note was made payable to the said Bulls, and endorsed by him in blank mearly as a means
21 of procuring the liability of the said Bulls as security for the payment of said debt to the said plaintiff, he, the said Bulls, never having either paid or received any value whatever therefor, of which the said plaintiffs had due notice, and he avers that after the note became due and payable, to wit, about the first day of December, 1860, the said Reaves being then fully solvent and able to pay the said Bulls, by his certain notice in writing, duly served upon the said plaintiffs, required them to sue the parties liable on said note, to wit, the said Reaves as principal, and the said Bulls as security, which the plaintiffs wholly omitted to do for more than the period of thirty days, and until the commencement of this suit, during which time the said Reaves became insolvent and unable to pay; which he is ready to verify. Wherefore, he prays judgment, &c.

4th plea. And for a further and fourth plea in this behalf, by leave of the court, &c., this defendant says actionem non, because he says that after the said promissory note sued on became due and payable, to wit, about the first day of January, 1861, at said eastern dis-
22 trict of Arkansas, the said plaintiffs, by special agreement with the said Reaves, the maker, gave him, the said Reaves, further time until he, the said Reaves, could make a crop of that year, or until the fall of 1861, to pay the said note, without consent of the said Bulls, and in violation of his rights as such indorser; which he is ready to verify. Wherefore he prays judgment.

CLARK & WILLIAMS,
For Def't.

Filed April 13th, 1872.

FRANK E. WRIGHT,
Clerk.

And which rejoinder is in the words and figures following, to wit:

JONES, BROWN & Co.
vs.
DAVID D. ROSS.

And now comes the said defendant, by attorney, and as to the said replication of the said plaintiff to this defendant's plea of the statute of limitation says actionem non because he says that
23 during the said rebellion, and on account thereof, the said courts were so closed that legal process could not be issued against this defendant from the month of May, 1861, until the month of March, 1865, and not longer, without this, that said courts were so closed from the first day of June, 1861, to the 6th of August, 1865, and this he is ready to verify. Wherefore he prays judgment, &c.

CLARK & WILLIAMS.

Filed April 13th, 1872.

FRANK E. WRIGHT,
Clerk.

And which demurrers are in the words and figures, to wit:

JONES, BROWN & Co.
vs.
ROSS, ADM. BULLS.

Plaintiffs demur to the amended third plea on the grounds stated in the demurrer on file to the original third plea.

And they demur to the defendant's rejoinder to the plaintiffs' replication to the second plea, because it merely puts in issue a
24 matter of public law pleaded in the said replication.

And they demur to the 4th plea of defendant, on the grounds that the plea does not aver that the delay given the maker of the note was upon a valuable consideration.

ENGLISH,
For Pl'ffs.

Filed April 13th, 1872.

FRANK E. WRIGHT,
Clerk.

And on April 19th, A. D. 1872, as follows:

JONES, BROWN & Co.
vs.
DAVID D. ROSS, ADM. BULLS, &C.

And now on this day the demurrer of the plaintiffs to the amended third plea of defendant, and the demurrer of the plaintiffs to the rejoinder of the defendant to the plaintiff's replication to the plea of
25 statute of limitation of the defendant, and the demurrer of the plaintiffs to the fourth plea of the defendant, were argued and submitted to the court; and the court doth sustain each of said demurrers, and the defendant thereupon elects to rest on said amended third plea, said rejoinder, and said fourth plea, and declines to answer over.

And on April 22d, A. D. 1872, as follows:

REUBEN S. JONES AND WM. N. BROWN, SURV'S, &c.,
vs.
DAVID D. ROSS, ADM., &C., OF JOHN H. BULLS, dec'd.

Come the plaintiffs, by E. H. and P. D. English, their attorneys, and the said defendant, by Clark and Williams, his attorneys, and by agreement in writing, herein filed, the parties waive a jury and submit this cause to the court, and the court, after hearing the evidence introduced by the parties, find for the plaintiffs and assess their damages at the sum of two thousand and ninety-four dollars and eighty-seven cents, ($2,094.87,) and in this assessment of damages the court allows
25 no interest upon the demand declared on from the sixteenth of August, 1861, the date of the proclamation of the President of the United States declaring the State of Arkansas in a state of insurrection, to the second of April, 1866, the date of the proclamation of the President declaring that said insurrection in said State had ceased, and the rebellion therein closed, (during which period the court also held that the statute of limitations did not run against the demand sued on.)

It is therefore ordered, considered, and adjudged by the court that the said plaintiffs recover of the said defendant, David D. Ross, as administrator, with the will annexed, of said John H. Bulls, deceased, the said sum of two thousand and ninety-four dollars and eighty-seven cents, ($2,094.87,) together with all their costs in this suit expended, to be levied of the goods and chattels and lands and tenements which were of the said John H. Bulls, deceased, at the time of his death, in the hands of the said David D. Ross, as administrator, remaining to be administered, if so much thereof in his hands to be administered he hath, and have execution therefor, as hereinafter provided.

27 Which agreement to submit is in the words and figures following, to wit:

JONES, BROWN & CO.
vs.
ROSS, ADM. BULLS.

Agreed by the parties that we waive a jury in this case, and that this cause may be submitted to the court sitting as a jury.

E. H. ENGLISH,
For Pl'ffs
CLARK & WILLIAMS,
For Def'ts.

Filed April 22d, 1872.

FRANK E. WRIGHT,
Clerk.

And on April 25th, A. D. 1872, as follows:

JONES, BROWN & CO.
vs.
DAVID D. ROSS, ADM.

It is further ordered and adjudged by the court that the defendant

shall pay the amount of the aforesaid judgment in due course of
28 administration, and failing to do so it is further ordered that execution shall issue as heretofore herein ordered.

And on April 29th, A. D. 1872, came the said defendant, by Clark and Williams, his attorneys, and filed his bond for writ of error *writ of error* and citation, which bond is in the words and figures following, to wit:

Supreme Court of the United States.

DAVID D. ROSS, AS ADMINISTRATOR OF THE estate of John H. Bulls, deceased, plaintiff in error,
vs.
JONES, BROWN & CO., DEFENDANTS IN ERROR.

Know all men by these presents that we, David D. Ross as principal and Sam'l W. Williams and Sol. F. Clark as securities, are held and firmly bound unto the above-named Jones, Brown & Co. in the sum of two hundred dollars, to be paid to the said Jones, Brown & Co., their executors or administrators, to which payment, well and
29 truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated the 29th day of April, 1872.

Whereas the above-named David D. Ross, as administrator of the estate of John H. Bulls, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the eastern district of Arkansas:

Now, therefore, the condition of this obligation is such, that if the above-named David D. Ross shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

SAM. W. WILLIAMS. [SEAL.]
SOL. F. CLARK. [SEAL.]

Sealed and delivered in the presence of us.

Approved:

HENRY C. CALDWELL,
Dist. Judge.

Filed April 29, 1872.

FRANK E. WRIGHT,
Clerk.

30 And which citation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To Jones, Brown & Co.:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's

office of the circuit court of the United States, for the 8th circuit and eastern district of Arkansas, wherein David D. Ross, as administrator of the estate of John H. Bulls, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 29th day of April, in the year of our Lord 1872.

HENRY C. CALDWELL,
Dist. Judge.

31 We acknowledge service of the above citation.
May 23, 1872.

E. H. & P. D. ENGLISH,
Att'ys for Jones, Brown & Co.

Filed April 29, 1872.

FRANK E. WRIGHT,
Clerk.

32 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Frank E. Wright, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writing' annexed to this certicate are true, correct, and compared copies of the originals on file and remaining of record in my office, in the case of David D. Ross, as adm'r of the estate of John H. Bulls, deceased, vs. Reuben S. Jones and William N. Brown, survivors of Harden B. Jones, deceased, late partners under the firm-name of Jones, Brown & Co.

In witness whereof I have hereunto set my hand and the seal of said court this 12 day of July, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-seventh.

[SEAL.] Attest:

FRANK E. WRIGHT,
Clerk.

(Indorsement on cover:) No. 384. David D. Ross, as adm'r of John H. Bulls, dec'd, plaintiff in error vs. Jones, Brown & Co. E. Arkansas. C. C. U. S. Filed 23d December, 1872.

IN THE

United States Supreme Court.

[*No. 384.*]

DAVID D. ROSS, as Adm'r of John H. Bulls,
Plaintiff in Error.

vs.

JONES, BROWN & CO.

APPELLANTS BRIEF.

IN THE

United States Supreme Court.

[No. 384.]

DAVID D. ROSS, AS ADMINISTRATOR OF JOHN H. BULLS,

Plaintiff in Error.

vs.

JONES, BROWN & CO.

APPELLANT'S BRIEF.

Jones, Brown & Co., brought their suit in assumpsit on a promissory note made by Robert E. Rives, and endorsed by John H. Bulls, both of Walnut Plains, Arkansas, of which the following is a copy:

"$1,488.88-100.

"MEMPHIS, TENN., January 31st, 1860.

"Nine months after date I promise to pay to the order of John H. Bulls, fourteen hundred and eighty-eight 88-100 dol-

lars, at the Branch Union Bank of Tennessee at Memphis. Value received.

"ROBERT E. RIVES,
Walnut Plains, Arks.

"[Countersigned.]
"R. S. JONES.
"Signed by R. S. Jones in my presence.
"J. J. BOUGHM, Com'r.

"[Endorsed.]
"JOHN H. BULLS.
"Walnut Plains, Arks."

Presentment, non-payment by Rives, and protest and notice to Bulls, are duly alleged.

The suit is against Ross, defendant below, as administrator of the estate of John H. Bulls, the endorser, and the death of Bulls, and granting of letters to appellant, are all duly alleged in the declaration. The suit was brought on the 10th day of November, 1871. At the April term, 1872, on the 9th of the month, Ross filed two pleas to the declaration, to-wit: non-assumpsit, and a plea "That the cause of action in the plaintiffs declaration contained, did not accrue to them against the said defendants at any time within five years next before the granting of letters on the estate of the defendant's intestate, John H. Bulls. [Pages 4 and 5.] The plaintiffs joined issue to the first plea, and to the second plea replied as follows:

"That for a long space of time, to-wit: from the 1st of June, 1861, to the 2d day of April, 1866, a war existed between the United States and the Confederate States, including the State of Arkansas, where, during all that period, the said John H. Bulls resided, and that during all that period the courts of the United States, in and for said State of Arkansas, were, by reason of the civil war, closed, and no process could be issued therefrom, or served on the said John H. Bulls, the authority of the United States therein being resisted, etc. That said John H. Bulls died, in said State of Arkansas, on the 13th day of November, 1869, and letters testamentary were duly granted

to Amanda Bulls, to-wit: on the 2d December, 1869, by the probate court of Prairie county, Arkansas; and that counting out the period of said war, the said plaintiffs cause of action did accrue within five years next before the said grant of letters on the said estate of said John H. Bulls." [Page 5.]

On the 10th of April, the defendant filed a third plea, and afterward, on the 22d, filed an amended third plea, by leave of the court, as follows:

"That the said Bulls' endorsement of the said note was made at Walnut Plains, in Arkansas; and that the consideration for the said note sued on was a debt due from the said Rives, the maker, to the plaintiffs for the sum mentioned in the same; and the said note was made payable to the said Bulls, and endorsed by him in blank merely as a means of procuring the liability of the said Bulls, as security for the payment of said debt to the plaintiff; he, the said Bulls, never having either paid nor received any value whatever therefor, of which the plaintiffs had due notice; and he avers that after the note became due and payable, to-wit, about the first day of December, 1860, the said Rives, being then fully solvent and able to pay, the said Bulls, by his certain notice in writing, duly served upon the said plaintiffs, required them to sue the parties liable on said note, to-wit, the said Rives as principal, and the said Bulls as security; which the plaintiffs wholly omitted to do for more than the period of thirty days, and until the commencement of this suit; during which time the said Rives became insolvent and unable to pay." [Page 7.]

And to the plaintiffs said replication to his plea of the statute of limitations, the defendant rejoined as follows, to-wit:

"That during the said rebellion, and on account thereof, the said courts were so closed, that legal process could not be issued from the month of May, 1861, until the month of March, 1865, and not longer, without this; that said courts were so closed from the first day of June, 1861, to the second day of April, 1866." [Page 8.]

To this rejoinder the plaintiff demurred on the ground that

it put in issue only matters of law; and also demurred to his amended third plea. [Page 8.]

The court sustained these demurrers, and the defendant rested. [Page 8.]

The cause was submitted, upon the issue to the first plea, to the court for trial, by consent. The questions here are upon the plaintiff's demurrers.

The state law, upon which the third plea is founded, is found in Gould's Digest, page 1015, and is as follows:

"SEC. 1. Any person bound as security for another in any bond, bill, or *note*, for the payment of money, or the delivery of property, may, at any time after such action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"SEC. 2. If such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, *such security* shall be exonerated from liability to the person notified."

We assign for errors here—

1. The court erred in sustaining the plaintiffs demurrer to defendant's rejoinder to his replication to plea of statute of limitation.

2. The court erred in sustaining the demurrer to defendant's third plea.

In regard to the first error assigned: The replication is founded upon the act of Congress, approved June 11th, 1864, entitled "an act in relation to the limitation of actions in certain cases." 13 *United States Stat. at Large*, 123.

We shall insist most strenuously that the gist of this replication is the fact that the courts were closed, and no legal proceedings could be had for a certain length of time during the war under this act of Congress. And the real issue, if it raises any at all, is, whether the courts were so closed a sufficient length of time to take the case out of the operation of the

statute. The act does not provide any particular length of time during which the statute of limitation should cease to run, but only during such time as the courts were closed, and thus left it a matter of fact to be determined by evidence. It being a matter of fact, the rejoinder is a special traverse. (See 1*st Chitty's Plead.*, 620.

The demurrer admits the truth of the rejoinder; *i. e.*, that the courts were not closed from June 1, 1861, to April 2, 1866, but only from the month of May, 1861, to the month of March, 1865, which would not be a sufficient length of time to take the case out of the operation of the statute. Now, it is plain that if the gist of the replication is the time of the closure of the courts under the act of Congress, then it is not true that the rejoinder sets up only matters of law, but a matter of fact, and the rejoinder is well pleaded. But no matter what is the substance of the replication if the rejoinder pleads only matters of law, then the replication is obnoxious to the same objection. A bad rejoinder is good enough for a bad replication. The effect of demurrer, in such case, is to reach back to the replication. See

United States vs. Arthur, 5 *Cranch.* 257.
Sprigg vs. Bank of Mt. Pleasant, 10 *Pet.* 257.
Butler vs. The State, 1 *Gill & Johns.* 383.
Allen vs. Crawfoot, 7 *Cow.* 46.
Tillotson vs. Stiff, 1 *Blackf.* 77.
Pearsall vs. Dwight, 2 *Mass.* 84.
Headington vs. Neff, 7 *O.* 229.
1 *Chitty's Plead.* 668.

In such cases judgment must be given against the party committing the first fault in pleading, which is here the plaintiffs. And if the demurrer be sustained, the judgment should be against the replication, and the court erred in not so deciding. If the judgment on the demurrer is right, then the plea (Stat. Lim.) is unanswered, and as the plea is a good bar, the final judgment should have been for the defendant.

This suit was decided before the adoption of the State's

Code, and when the court was governed by the common law pleadings and practice, and we insist we are entitled to the benefit of those rules.

But it is contended that the gist of the replication is the statement of the existence of the war between the Confederate States and the United States during the period named, without any reference to the courts being closed so that suit could not be brought, and independent of the acts of Congress referred to.

To this we insist, first, that this is not the purport of the replication; and, secondly, in that view, it is no answer to the plea, and was therefore equally obnoxious to the demurrer.

The replication plainly sets up the war and the closing up of the courts thereby, as jointly operating under the act of Congress referred to, to intercept the running of the statute. The act of Congress does not intercept the statute upon the separate fact of the existence of the war in any State, nor upon the facts of the closure of the courts separately, but only when during the war, and on account thereof the courts were closed, etc. The allegation of neither one of these facts alone would have been an answer to the plea. The act does not contemplate a case where the war might have existed, but where the courts were nevertheless open, and the parties were at liberty to prosecute their actions. And where several facts making one defense are pleaded, it is only necessary to traverse one of these facts. See

1 *Chitty's Pl.*, 227, *and note* 2.
Patcher vs. Sprague, 2 *John.* 462.
Tucker vs. Ladd, 7 *Cow.* 450.

It is not denied that the war existed as a fact. And if that fact alone was sufficient to intercept the running of the statute without reference to the act of Congress, or the closing of the courts, then the rejoinder was bad for traversing an immaterial fact. But this position, we insist, is neither founded in principle nor sustained by any authority. The very existence of the act of Congress of June 11, 1864, is the voice of Congress against this position, for in that case the act would be without import—mere nonsense. Of course this case is not to be

referred to the principle involved in the case of *Hanger vs. Abbott*, 6 *Wall.* 532. We entirely agree that between debtor and creditor, citizens of two opposing belligerents at war, the statute of limitations cannot run. The reason is, because, in such case, all intercourse between the parties is interdicted, and all contracts are suspended. It is the dynamic effect of the prohibition of intercourse—the suspension of the contract, to intercept the running of the statute. These reasons, for this effect, were well stated in the case above referred to. The proclamation of the President declaring such non-intercourse, put the States in rebellion in the attitude of belligerents. It created the conditions appertaining to foreign war as to certain effects. But the parties here were at all times citizens of Arkansas and Tennessee, respectively—both States being of the same belligerent in the war. Intercourse between these States was not at any time interdicted, either by proclamation of the President or as an effect of the war. A payment of the debt at any time would have been legal. At any time the plaintiffs were at liberty to sue on the claim, provided any court had been open having jurisdiction of the cause. And it is judicially known that the court which tried this case below was open and doing business as early as April, 1864. From that time, at least, there was no impediment, either in law or fact, in the way of the plaintiffs recovering his debt. It has never been held in England that civil war and commotion in any manner arrested or suspended the laws, except between communities as to whom belligerent rights had attached, and non-intercourse had been declared. By one unbroken chain of decisions from Henry the Eighth's time to the present, it has been held that insurrection and civil war did not interfere with the running of their various laws of limitation.

Stowell vs. Zouch, 1 *Plowd.* 353.
Prideaux vs. Webber, 1 *Levinz.* 31.
Lee vs. Ponyers, 1 *Levenz.* 110.
Hall vs. Wybourne, 2 *Salk.* 420.
Aubrey vs. Fortesine, 10 *Mod.* 205.

Miller vs. Predeaux, 1 *Keble* 157. And see
Beckford et al. vs. Wade, 17 *Ves.* 87.

All these cases, and many more which might be cited, were of course between parties who were citizens of the same jurisdiction in the war, and could, as held in *Hanger vs. Abbott*, have no application to the case of an action by a citizen of one belligerent against that of the other. But, moreover, these were all decisions where the courts were actually closed on account of the war; and they unanimously hold that this makes no difference. That where the legislature has not made the existence of war, or the closing of the courts on account thereof, an exception, the courts can make none. In fact, by the common law the closure of the courts was the criterion by which peace or war was determined.

"And, therefore, when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped *so as the courts of justice be as it were shut up—et silent legis inter arma*—then it is said to be time of war." 3*d Coke Litt.* 40*.

It is true that upon a dissezin in time of peace descent cast in time of war did not tell the entry. See the same, and *Hanger vs. Abbott.* But this was because to have that effect at any time the disseizee must be under no impediment in the life of the ancestor, and an express distinction between such case and the statute of limitations was taken by the courts. See note (Q) to authority last cited.

It was on account of this construction of the law that Parliament, upon the shutting up of the courts by the departure of King James the Second out of the realm, found it necessary to interfere, and to enact "That from the 10th day of December (the day of his departure) till the 12th of March, 1688, (when King William assumed the government), should not be accounted any part of the time, within which any person, by

virtue of the statute of limitations, might bring his action, but that he should have so much allowance of time as was from the 10th of December to the 12th of March for bringing his action.

6 *Bac. Abr., title Lim. of Act E.* 6, *page* 395.

Had the statute ceased to run by operation of the civil war then prevailing, and the closure of the courts thereby, there would have been no need of that statute. So with the act of Congress of the 11th June, 1864. Had the war the legal effect of stopping the running of the statute, the act as aforesaid would have been nugatory. Both these statutes were founded in the same exigency, and had the same object. We refer to them both as the very highest authority that neither by the common law nor the law of nations, if the latter would have any application in such a case, does civil war affect the laws of limitation as between parties under the same jurisdiction are belligerent power, even where the courts are actually closed on account of such war. The closure of the courts being the fact which determined the existence of the war, all the authorities refer to this fact; and itself not having the effect to stop the running of the statutes, no state of rebellion or civil commotion, not attended by this fact, could have that effect, of course.

Now, if this court holds that our civil war, as between friends (not enemies) of either of the belligerent parties, where it is proved, as it is by the pleadings here, that the courts were not closed, but open, the effect of the ruling will of course be that the statutes of limitations ceased during the war to run every where in the United States. For the two parties by the war embraced the whole country. Every man in the States not in the Confederacy, was an enemy to every man in the Confederacy. If the civil war of itself, without reference to places in actual military occupation—in other words to the closure of the civil courts had that effect, then of course the rule applies as well in Maine as in Virginia—as well in Minnesota as under the guns at Vicksburg—and not only so, but such a ruling is to hold that the effect of war, whether foreign or domestic, is

to abrogate limitation laws generally during its continuance. This position we think little less than absurd. We know that limitation laws, either Federal or State, did not cease to run during our war of 1812 with Great Britain, nor during the Mexican war. And yet that such is the effect of the decision below in this case under the pleadings, cannot be controverted.

One of three positions in reference to the question is certainly true. Either that the statutes of limitation were wholly unaffected by the war any where, except as between enemies—or they ceased to run every where by its operation—or they ceased to run where the courts were closed by its operation, and not elsewhere.

Now, as the second position is too unreasonable and absurd to be insisted upon, let us see further if the judgment can be maintained under the third position. If we admit, contrary to all authority, (as we have shown), that the closure of the courts by civil war prevents the running of limitation laws, as between friends or parties under jurisdiction of the same belligerent, it is, as we have shown, admitted by the pleadings in this case, that the courts were not closed in Arkansas, the domicil of the delinquent, and the place where the debt was payable, a length of time sufficient to prevent the bar. But it is said this was not a fact to be admitted, but was a question of law. That the courts, *as between such parties*, were closed by construction of the President's proclamation of 16th of August, 1861, declaring said State of Arkansas in a state of insurrection, and remained closed by virtue thereof until his proclamation of 2d of April, 1866, declaring that such insurrection had ceased; that this proclamation, and that construction of it, is a matter of which the courts will take judicial notice; and that it is not competent to plead or prove contrary to such construction, that the courts were in fact not closed, but open and ready to hear the plaintiff's cause.

We deny that this position has any foundation whatever in law. Nor can it be sustained by any kind of reasoning, analogical or direct.

In the first place, it has always been held by this court that the war, in its effect to prevent the running of the law of limitation, did so by way of closing the courts, or what is the same thing, imposing a disability to sue in them. Only as to such upon whom it had this effect, could it in any manner interfere with such laws. This was broadly and emphatically held to be the ground upon which the case of *Hanger vs. Abbott*, above cited, was decided. The court say:

"Total inability, on the part of an enemy creditor, to sustain any contract in the tribunals of the other belligerent, exists during war, but the restoration of peace removes the disability *and opens the doors of the courts.* Absolute suspension of the right and prohibition to exercise it exists during war by the law of nations; and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim."

And see the case of *Brown vs. Hiatts*, 15 *Wall.* 177, 184, where his honor, JUDGE FIELD, delivering the opinion of the court, said:

"Statutes of limitation in fixing a period within which rights of action must be asserted, *proceed upon the principle that the courts of the country, where the person to be prosecuted resides, or the property to be reached is situated are open*, during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible.

"As is well said in the recent case of *Simmis vs. Hartford Ins. Co.* (13 *Wall.* 160), 'The law imposes the limitation, and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other.'" And we might cite many other cases where this court has held the same thing.

The effect of the proclamation was, therefore, to call into

operation the law of nations governing a state of public war as between the States proclaimed to be in rebellion and the other States; and this law made public enemies of the citizens of the respective parties, and suspended all rights of action, and, as a consequence, the statute of limitation between them during the existence of the war. And as the President, under the Constitution, cannot by proclamation either declare war or suspend the laws; we insist, even to have this effect, the proclamation derived its authority from the act of Congress of July 13, 1861, declaring non-intercourse between the States named and the other States. And in point of fact, the proclamation did have that effect. During the actual existence of the war the courts were closed. No suits were or could be brought by such parties. The plea of alien-enemy was or could have been pleaded in all such cases.

But the doctrine contended for requires that the proclamation should have actually closed the courts and made their proceedings illegal; or, what is the same thing, imposed a disability to sue therein, not only upon citizens of States not in rebellion, but upon all others. Upon friends as well as enemies; and not only during the actual existence of the war, but for more than a year after the war was actually closed in Arkansas.

In point of fact, we know it did no such thing. On the contrary, the courts were in full operation in most if not all the rebellious States during the period named. Where loyal judges did not exist, they were appointed by the President, confirmed by the Senate, and in many cases organized the courts and tried causes during the insurrection so proclaimed. Such was the case in Arkansas. If the courts were closed, or all rights of action suspended on the part of friends as well as enemies, who was there to sue? How could the courts do business? And if not, how did the proclamation operate to suspend the running of the statute? We might name more than half a dozen cases tried during the period named, by these courts, and brought to this court by appeal, and passed upon here without objection. How is this court one day to adjudicate a cause and on the next

day hold that all the proceedings in that cause were illegal—that all the rights of the parties adjudicated had been suspended by the proclamation when the cause was tried below. The case of *Hanger vs. Abbott*, above cited, is such a case. If the doctrine contended for is true, the war was not closed when that suit was brought in the Circuit Court for the Eastern District of Arkansas. That is an authority to the effect that the proclamation did not carry the effect of the public law which suspended the action of the courts even as to alien enemies beyond the actual existence of the war in Arkansas.

If not as between enemies, how could it as between friends? To sustain this position, therefore, it is necessary to look to some other ground, upon which the proclamation operated, than that by which it suspended the running of the statutes of limitations as between enemies in the war. Of such other ground we can form no conception, and are fully persuaded that to give it such operation by the courts is a bold usurpation.

Under the Constitution, the President has neither the power to declare war nor to suspend the laws, at least not unless authorized by Congress. If the act of Congress of 13th of July, 1861, did give him that power, it was only "between inhabitants of the States in insurrection and the rest of the United States." It did not pretend to give him power to interdict trade and intercourse between the several inhabitants of the States in insurrection. Such a power can, therefore, neither be derived from the public law of war nor from Congress.

But, secondly, if upon any ground the proclamation could have such effect, it is, we suggest, absolutely prohibited by the act of Congress of June 11th, 1864. That act by unavoidable implication provides that the statutes of limitation shall not cease to run except where and between parties as to whom the courts are closed and service of process cannot be had on account of the war. And this upon the express maxim, "*expressum facit cessare tacitum.*"

Cates, 2 *in Term, vs. Knight*, 3 *Term* 442.
Rex vs. Cunningham, 5 *East.* 478.

2 *Dwarris*, 712, 713.

Rex vs. Woodland, 2 *East.* 166.

Broom Legal Maxims, 183, 185.

But it is said that the question has been decided by this court, and two cases are referred to, to-wit:

Adger vs. Alston, 15 *Wall.* 555. And,

Heldine vs. Sumner, *Id.* 600.

It only requires one to carefully examine the former case to see that it does not decide any such thing. It only holds, in effect, that if the rule contended for in this case was applied still the statute would be a bar. Whether it would apply, the principle was not decided, and the case has no bearing whatever. But in the latter case, JUDGE BRADLEY declaring the opinion, says:

"The plea of prescription cannot be sustained in this case, inasmuch as the bill was filed in February, 1867, and we have lately held in the case of *Adger vs. Alston* that all statutes of prescription and limitation were suspended, at least in the Federal courts, during the period of the late civil war, which was not solemnly determined in Louisiana until the President's proclamation of April 2, 1866."

As there is nothing whatever in this case to show whether the plaintiff creditor was a citizen of the State in insurrection during the war, it is impossible to say whether this is the mere dictum of JUDGE BRADLEY or the decision of the court on a material point. But taking the language here used in its general and natural import, this court will certainly not regard it as speaking either the law or the truth. If so, then the statutes of limitations ceased to run even in New York between the citizens of New York, which we know was not the case. And moreover, a simple reference to the case of *Adger vs. Alston* will show that it does not in fact decide what is here stated. If, however, as here seems to be indicated, this court is of that opinion, we claim it as a right that this court, in so deciding, should not confine itself to a bare affirmance of the legal posi-

tion, but should give the reasoning upon which they arrive at such conclusion, and the authority upon which it is based.

In addition to the ancient and common law authorities which we have cited to the contrary, we also refer to the following modern cases:

McIver vs. Ragan, 2 *Wheat.* 29.
Bank of Alabama vs Dalton, 9 *How.* 249.
Troup vs. Smith, 20 *Johns* 33.
Callis vs. Waddy, 2 *Munf.* 511.
Zacharie vs. Godfrey, 50 *Ill.* 186.
Sherman vs. Western Ins. Co., 24 *Iowa* 515.
Munson vs. Robertson, 19 *La. An.* 170.
Hutchinson vs. Richardson, 19 *La. An.* 187.
Bennett vs. Worthington, 24 *Ark.* 487.
Stewart vs. Kahn, 11 *Wall.* 493.
United States vs. Wiley, *Id.* 508.
Braum vs. Sauerwein, 10 *Wall.* 218.

We add an estimate of the time the statute run upon the claim under the pleadings in the case:

	Yrs.	Mo.	Drs.
From time the note was due, 31st October, 1860, to the time of granting letters on Bulls estate, December 2, 1869.....	8	1	2
Deduct time from 6th May, 1861, when the State seceded, to and including March, 1865, when a term of circuit court was held. (Two terms, in fact, were held in 1864)...	3	10	25
	5	2	7

But, moreover, in point of fact the courts were not closed in Arkansas until the 16th of August, 1861, when the President's proclamation declared non-intercourse. Up and until that time JUDGE RINGO held the circuit court below regularly, and performed all business as usual.

Next, as to the second error assigned: that the court below erred in sustaining plaintiffs demurrer to defendants third plea.

It is claimed that an endorser of a note is not a security within the law which authorizes securities to insist upon the obligee to use dilligence in pursuing the principal. That it is the duty of the endorser to take up the note, and thus pursue his remedy over against the maker or other party. And STORY, on *Promissory Notes, secs.* 115 *a* 419, and cases there cited is referred to. This may be so with reference to endorsers in due course of business under the law merchant, and with reference to the common law, right of the sureties to insist upon or compel dilligence on the part of the principal. But the statute of Arkansas gives a specific right to this remedy to "any person bound as security for another in any *bond, bill, or note,*" etc. "And the facts alleged in the plea, which are admitted by the demurrer, certainly make him a security within that statute. Bulls never had any interest in the note; and plaintiffs were not holders for value from him; nor were they holders without notice. They took the note themselves from Rives, the principal, on a debt due from him, knowing that it was made payable to Bulls, and endorsed by him as security. The statute certainly contemplates that a party *can* become connected in some way as security in a note. How more fitly than in the way here resorted to? His being a security, is a matter of fact, and does not at all depend upon the form of his relation to the note. He may be security in many ways—as endorser or as maker.

It will not do to say that a party cannot as an endorser be a security. The utmost that the law, independent of the statute, declares is that he is not such by virtue of the relationship. And it has been always held, we believe, that he might prove himself so in fact, in order to entitle himself to the rights of a security as against the principal. See

State Bank vs. Watkins, 6 *Ark.* 123.
Hempstead vs. Watkins, Id., 317. And see
Rogers vs School Trustees, 46 *Ill.* 428.
Piper vs. Newcomer, 25 *Iowa* 221.
Paine vs. Packard, 13 *Johns.* 174.

Bradford vs. Carey, 5 *Barb* 461.
Sessan vs. Barrett, 2 *N. Y. Rep.* 406.
Edwards on Bills, and notes, 572.
Bank vs. Klingensworth, 7 *Watts* 532.

It is true, that most of these authorities refer to the makers instead of the endorsers of the note or bond. But there can be no question but what the principal is as applicable to the latter as the former. In the case of *Bradford vs. Carey*, the Court say:

"But, although an endorser stands in the relation of a security to the drawer, in consequence of an endorsement of *an accommodation* note, or of a special promise of the latter to save him harmless, he does not lose his character as endorser, as respects the holder of the note, and he cannot be made liable on the note without a demand and notice. *He continues endorser*, with all *the privileges of a surety*. And the case of *Bank vs. Klingensworth*, (*cited*), is also in point, and decides that a *second accommodation endorser is a security*, and may require his immediate endorser to issue an execution on a judgment on the note against the maker and endorser. And a refusal to do so, is a good consideration to support a verbal promise to relieve the surety.

And see the case of

Grew vs. Burdett, 9 *Pick.* 265.

We know that this court, in the case of *Sprigg vs. Bank of Mt. Pleasant*, 10 *Peters* 257, declares that "An obligee in a bond, *which declares him to be a principal debtor*, is estopped to plead that he was merely a surety;" but this decision is put upon the express ground of estoppel, growing out of the words in the instrument declaring the obligee to be bound as principal. And they expressly admit that it would not be so where, as in *Paine vs. Packard*, 13 *Johns.* 173, there were no words indicating, expressly, in what character the party was liable. Or, in the language of the court, where "there was no conflict between the note and the averments in the plea." And the court say: "But when one, who is in reality only a surety, is

willing to place himself in the situation of a principal by expressly declaring upon his contract that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself." In this case Bulls did not bind himself as principal, by any language in the instrument. His liability results from merely signing his name in blank on the back of the note. There is nothing in the instrument to conflict with the truth of the pleas that he signed as surety merely. And as, in *Paine vs. Packard*, approved by this court in that case, the truth of the plea is admitted by the demurrer, we regard that case as directly in our favor by its approval of the same points involved in both this and the New York case referred to.

In conclusion we insist that the judgment ought to be reversed; because the action was barred by statute of limitation; and because Bulls, the defendants intestate, had, as security, been discharged under the Arkansas statute referred to.

If we look through the books, we shall find perhaps that four-fifths of all the cases, touching the rights of securities, have been by parties to notes and obligators; and they either actually or impliably admit that the relationship to the instrument is wholly consistent with the suretyship. See, in addition to above authorities, the following, which we regard as directly in our favor on this point:

England vs. McKawley, 4 *Sneed.* 75.
Boyd vs. Titzer, 6 *Caldwell* (*Tenn.*) 568.
Wright vs. Stockton, 5 *Leigh.* 161.
Jones vs. Whitehead, 4 *Geo.* 402.
Towns vs. Riddle, 2 *Ala.* 697.
People vs. Buster, 11 *Cal.* 215.
Bethune vs. Dazier, 10 *Geo.* 235.
Letcher vs. Tantis, 3 *Dana* 162.
Ranton vs. Lacey, 17 *Mo.* 399.

CLARK & WILLIAMS,
For Appellant.

Supreme Court United States.

DAVID D. ROSS,
Administrator of Bulls,
vs.
JONES, BROWN & CO.

No. 384.

ERROR TO THE CIRCUIT COURT EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANTS IN ERROR.

On the 31st of January, 1861, Robert E. Rives, of Arkansas, made a note to John H. Bulls, of the same State, at Memphis, Tennessee, payable nine months after date, and Bulls indorsed it to Jones, Brown & Co., of Memphis. The note was protested at maturity, and notice to the indorser.

Bulls died in Arkansas, 15th November, 1869, leaving a will, and on the 2d of December, 1869, letters testamentary were granted to Amanda F. Bulls, who afterwards intermarried with David D. Ross, and he succeeded her in the administration, 7th of September, 1871.

This suit was brought by Jones, Brown & Co., in the Circuit Court of the United States for the Eastern District of Arkansas, against Ross, as administrator of Bulls, upon the indorsement.

The defendant filed four pleas:

1. Non assumpsit.

2. Limitation.

3. (Amended third plea,) that Bulls was an accommodation indorser, and after the maturity of the note gave plaintiffs a written notice to sue the maker, which he failed to do within thirty days, etc.

4. That plaintiffs gave Rives a further day of payment without the consent of Bulls.

To the second plea, the plaintiffs replied the war.

To the third and fourth pleas they demurred.

To the replication of the plaintiffs to the second plea, the defendant rejoined, and plaintiffs demurred to the rejoinder.

The court sustained the demurrers, defendant rested, the cause was tried on the issue to the first plea, and judgment for plaintiffs.

1. Was the cause of action barred by the statute of limitation?

The Arkansas limitation to unsealed written contracts is five years. *Gantt's Dig., sec.* 4125.

The note sued on matured 1st November, 1860.

Under the laws of Arkansas, where the maker of a contract dies, the general statute of limitations runs from the maturity of the contract to the granting of administration upon his estate, when the general statute ceases to run, and the statute of non-claim begins to run. *Brown as ad. vs. Merrick et al.*, 16 *Ark. R.* 612. *Biscoe et al., vs. Madden*, 17 *Ark. R.* 533.

Hence the defendant below pleaded that the cause of action did not accrue to the plaintiffs at any time within five years next before the grant of letters of administration upon the estate of Bulls.

The replication to the plea, (as well as the declaration,) shows that the first letters were granted 2d December, 1869.

This court has held that the war was flagrant in Arkansas from April, 1861, to April 1866, and the courts of the United States, in contemplation of law, closed during that period, and that hence the statutes of limitation did not run during that time. *Batesville Institute vs. Kauffman*, 18 *Wallace*, 151.

Counting out this period, the action was not barred.

The replication to the plea of limitation set up, in effect, that the courts were closed during that period.

The rejoinder to the replication alleged, in effect, that the courts were closed for a shorter period, which presented a matter of law merely, and the demurrer was properly sustained to it.

The counsel for the plaintiff in error insists that inasmuch as both parties resided within the States in rebellion, the limi-

tation was not suspended during the legal period of the war in Arkansas.

In Adger vs, Alston, 15 *Wallace*, 560, the plaintiff below was a citizen of South Carolina, and the defendant's intestate, a citizen of Louisiana, and the court applied the principle settled in *Hanger vs. Abbott*, 6 *Wallace*, 532.

In Batesville Institute vs. Kauffman, 18 *Wallace*, 153, the plaintiff below resided in Louisiana, and the defendant was domiciled in Arkansas, and the court held that the statutes of limitation were suspended during the period above stated.

The demurrer was, therefore, properly sustained to the rejoinder.

2. The amended third plea was drawn under secs. 1 and 2, chap. 157, *Gould's Dig. Stats. of Ark.* Same statute in *Gantt's Dig., chap.* 128.

This statute provides that a *surety* in any bond, bill or note, may give the holder notice to sue the principal, in writing, and if he fails to do so within thirty days, the surety shall be discharged. See the whole statute.

This plea was demurred to, on the grounds: 1. That the indorsement of Bulls made him primarily liable to plaintiffs on his contract of indorsement. That his contract was separate and distinct from that of Rives, the maker of the note. That there was no unity or privity of contract between Rives and Bulls, and Bulls was in no sense the surety of Rives on his contract. 2. That the liability of Bulls on his contract as indorser became perfect on protest of the note and notice, and he could not discharge it by the matter set up in the plea under the Arkansas statute.

The Supreme Court of Arkansas has never decided that an indorser of a bill or note was a *surety* under the above statute.

The indorser of a note or bill is not a *surety* within the meaning of this statute.

The note was dated, and payable in Tennessee, and the contract of the maker governed by the laws of Tennessee. The indorsees lived in Tennessee, and could in no event be affected by an Arkansas statute.

The contract of an indorser renders him primarily liable to the holder. He stands in the attitude of the drawer of a new bill. *Byles on Bills, marg. p.* 117, *top p.* 217. 2 *Parsons on Bills and Notes*, 25.

By the common law the maker and indorser cannot be joined as defendants, because they are liable on different contracts. There is no privity between them. The indorsement is a new contract. *Parsons on Bills and Notes*, 25. But the principal and surety to a note may always be joined. They are bound simply in the same contract.

Indorsement creates a new contract with indorsee. It is an original undertaking, and not a promise to pay the debt of another. 2 *Parsons on Bills and Notes*, 23-25.

The indorser cannot, like a *surety*, call upon the holder of the note to proceed and collect it of the maker; for the indorser, though in the nature of a surety, is answerable upon an *independent contract*, and it is *his duty to take up* the note when dishonored. An accommodation indorser stands in the relation of a surety towards the party for whose accommodation the indorsement is made, and may recover against him the costs to which he has been subjected; but he does not thereby lose the character of on indorser, as respects the holder of the note. *Edwards on Bills and Prom. Notes, p.* 292-3. Citing:

Pain vs. Packard. 13 *John. R.*, 174.
Trimble vs. Thorne, 16 *John. R.*, 162.
Warner vs. Beardsley, 8 *Wend. R.*, 194.
Bradford vs. Corey, 5 *Barb. R.*, 461.

The indorser in this case added to his signature the word "*surety.*" *See Sisson vs. Barret*, 2 *Comst. R*, 406. *See also* 12 *Wheaton*, 183.

Mere indulgence, or delay by the holder to sue the maker, will not discharge the indorser. There is no obligation to use the diligence, as is generally the case against a *principal* in order to hold a *surety* liable, at least where the surety calls upon the creditor to act.

Byles on Bills, (*marg. p.*) 193.—*Sharswood's Notes.*
Bank vs. Myers, 1 *Bailey*, 412.
Powell vs. Waters, 17 *John. R.*, 176.
Worsham vs. Goar, 4 *Porter*, 441.
Stafford vs. Yates, 18 *John.*, 327.
Sterling vs. Marietta Co., 11 *Serg. & Rawle*, 179.
State Bank vs. Wilson, 1 *Deveraux*, 484.
Foreman's Bank vs. Rollins, 1 *Shepley*, 202.
Page vs. Webster, 3 *Shepley*, 244.
Pierce vs. Whitney, 1 *Shepley*, 113
Bank of Utica vs Ives, 17 *Wend.*, 501.

If the holder of a promissory note be called upon by the *indorser*, after the note has become due, to prosecute the maker, of whom the amount might then be collected, but who afterwards becomes insolvent, and he neglects so to do, this will not discharge the indorser. *Byles vs. Bills*, marg. p. 193, top p. 312. Note by *Sharswood*, citing:

Trimble vs Thorn, 16 *John. R*, 152.
Beebe vs. West Branch Bank, 7 *Watt's & Serg.* 375.

Mr. PARSONS, in his work on *Bills and Notes*, states the weight of authority, and the better opinion on principle to be, that an indorser is not *surety*, and that delay, or indulgence by the holder to sue the maker, though requested by the indorser, will not discharge the indorser. 2 *vol.* p. 242, 243, 244 *and notes.*

Since the indorser of a bill or note, upon paying it, generally has a complete power to re-instate himself in possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties; the same reasons do not exist, as may in common cases of *suretyship*, to compel the creditor to active diligence by suit against the principal debtor. And therefore, so long as the holder is simply passive, all his remedies remain—he is not bound to active diligence. But a valid contract to delay, founded on a consideration, will discharge the indorser. *Bateman on Commercial Law, sec.* 381. 12 *Wheaton*, 183.

As an additional reason to show that the contract of the indorser, and the contract of the maker of a note, are several and distinct; the maker of the note, as well as one who signs it with him as *surety*, is liable, in all events, to pay to the holder the full amount of the note, while a holder who buys the note of the indorser for less than its face, can recover from the indorser only what he paid, with interest. 1 *Parsons on contracts, p.* 257–8.

After the holder of a dishonored bill or note has given due notice to the indorsers, he may indulge the acceptor or maker with forbearance or delay, without losing his claim on the indorsers, provided he retains the power of enforcing payment at any time, but a bargain for delay, on a binding consideration, discharges the indorser. 1 *Parsons on contracts p.* 285.

3. ON DEMURRER TO FOURTH PLEA.

The 4th plea is bad because it does not aver that the agreement, alleged in the plea of the plaintiffs, to give time to Rives, the maker of the note, was upon a valid consideration. Mere delay, or an agreement to delay suit against the maker of a note or bill does not discharge the indorser. *Story on Prom. Notes, secs.* 413, 414, 416, 417.

2 *Parsons on Contracts, page* 26, *note F, and cases cited.*

A mere voluntary forbearance, an agreement without consideration, enlarging the time of payment, is no discharge of an indorser. *Bateman on Commercial Law, secs.* 407, 381–2. Not even if the maker become insolvent during the delay.

5 *Wend*, 501.
13 *Maine*, 202. 23 *Ib.* 157.
17 *Pick.*, 150. 8 *Ib.* 458. 10 *Ib.* 129.

It is respectfully submitted that the judgment should be affirmed.

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